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C O N F I D E N T I A L SECTION 01 OF 02 BRUSSELS 001198

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SUBJECT: PROGRESS IN DISCUSSIONS WITH EU ON LEGAL ISSUES
ASSOCIATED WITH THE WAR ON TERRORISM

REF: BRUSSELS 810

Classified By: EMIN JOHN SAMMIS FOR REASONS 1.4 (b) AND (d)

¶1. (SBU) Summary. In a meeting with Legal Advisers from the 27 EU countries on March 21, State Department Legal Adviser John Bellinger and the EU presidency chair, German Foreign Ministry Legal Adviser Georg Witschel, developed increasing consensus around two fundamental U.S. legal positions that, before this meeting, had been resisted by European governments: 1) that there was a war in Afghanistan in 2001-2002, when the majority of Guantanamo detainees were captured, that was covered by the law of war; and 2) that it is possible to be in a state of armed conflict with a terrorist group like Al Qaeda. This represents a significant advance in the process that began eighteen months ago, and a number of Bellinger's counterparts remarked privately that they have developed a much better understanding of U.S. positions as a result of the intensified dialogue. At the same time, EU counterparts have raised concerns about a number of follow-on legal questions related to the scope of the continuing armed conflict with Al Qaeda, including how to identify where it is ongoing, how to determine when it is appropriate to use military force, how long the conflict will go on, and how to differentiate combatants from non-combatants. We will need continued dialogue to explain U.S. positions fully and to answer these questions satisfactorily. End Summary.

¶2. (SBU) John Bellinger, State Department Legal Adviser, and Joshua Dorosin, Assistant Legal Adviser for Political-Military Affairs, met March 21 in Strasbourg with counterparts from the 27 EU Member States and representatives from the Council and Commission Secretariat to continue their intensive dialogue on legal issues related to the ongoing armed conflict with Al Qaeda. This was the sixth meeting of this group in the last fourteen months, and closely followed meetings in Brussels on February 27.

¶3. (SBU) After beginning the session with an update on the newly-promulgated Military Commission regulations and the recent U.S. Court of Appeals decision in the Boumediene case, Bellinger and his counterparts devoted the majority of the four-hour meeting to discussing whether it is legally possible for a state to be in an armed conflict with a non-state actor, like Al Qaeda, outside that state's territory. In particular, the group focused on the international legal principles that govern when a state may resort to the use of force in assessing whether a state would

have a right to use military force against a non-state actor.

Bellinger and Dorosin explained that the United States believes that it is in an ongoing state of armed conflict with Al Qaeda, and that whether a state would have a right to use force to respond to an attack or threat of attack by a terrorist organization under use of force principles would depend the facts. When the United States and allies commenced military operations in Afghanistan in 2001, no state questioned the right of the United States to take military action against Taliban and Al Qaeda forces, in the exercise of the inherent right of self-defense reflected in Article 51 of the United Nations Charter. Indeed, the unanimous adoption by the Security Council of resolution 1373 recognized this right. As a factual matter, the United States believes that this armed conflict has continued on battlefields in or near Afghanistan, and that the armed conflict has manifested itself in other places in the world where Al Qaeda forces have engaged in hostile acts against us.

¶4. (SBU) For the first time in the eighteen-month process, the group engaged in a detailed two-way conversation that displayed dramatically different positions among EU counterparts on these legal issues. Some, including notably the French and Greek representatives, resisted discussing law of war principles, insisting (as in prior meetings) that governmental operations against terrorist groups like Al Qaeda should be limited to law enforcement actions and that the rules governing those operations must respect human rights norms. Others, including the UK, German, Danish and Austrian representatives, noted that it would be appropriate to consider whether to use military force against terrorist forces under traditional use of force principles and agreed that it would be appropriate to discuss the relationship between such analyses and the specific rules governing

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military operations during this type of armed conflict. These four states basically agreed that the United States was authorized to intervene militarily in Afghanistan in 2001, but they questioned whether the conflict that began then continues today, in light of the establishment of the Karzai government. Bellinger and Dorosin pressed back hard on this point, asserting that, as a factual matter, there had been no interruption of hostilities, and noting that even the ICRC has indicated publicly that the armed conflict in Afghanistan continues, albeit in a form that reflects a shift in the character of the conflict from international to non-international.

¶5. (SBU) By the end of the session, Bellinger and Witschel had succeeded in developing increasing consensus around two fundamental U.S. legal positions that, before this meeting, had been resisted by European governments: 1) that there was a war in Afghanistan in 2001-2002, when the majority of Guantanamo detainees were captured, that was covered by the law of war; and 2) that it is possible to be in a state of armed conflict with a terrorist group like Al Qaeda. At the same time, EU counterparts raised concerns about a number of follow-on legal questions related to the scope of the continuing armed conflict with Al Qaeda, including how to identify where it is ongoing, how to determine when it is appropriate to use military force, how long the conflict will go on, how to differentiate combatants from non-combatants, and what specific rules should govern state action in such conflicts.

¶5. (C) Comment. The detailed discussions that took place during this latest meeting showed some areas where agreement might be possible between the United States and certain key members of the EU and highlighted where differences remain. We will need to engage in continued dialogue to explain U.S. positions fully and to answer these questions satisfactorily. Separately, Bellinger and German representative Georg Witschel, currently serving as the COJUR presidency chair, discussed how best to reflect this ongoing dialogue in the U.S.-EU Summit Statement, and agreed to develop proposals

over the next few weeks to assist Summit Statement drafters in preparing text. End Comment.

¶6. (U) This cable was drafted and cleared by L.

McKinley

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